Supreme Court, U.S.
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No. 94-441

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BILLIE BRYAN MACKEY,
Petitioner,

v.

CLIFFORD MOSS, EARL L. LAURENCE, HAROLD ROTH and RALPH BAIN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF

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Respondents do not address the merits of the important issues raised by Ms. Mackey and argue, instead, that the "heightened pleading standard" and "direct evidence" issues are not presented in this case. This argument is inconsistent with the record herein. We note that on October 3, 1994, the Court requested the Solicitor General to state the position of the United States on these same issues in *Kimberlin v. Quinlan*, 17 F.3d 1525 (D.C. Cir. 1994) (on denial of rehearing *en banc*), *pet. for cert. pending*, 63 U.S.L.W. 3009 (U.S. June 22, 1994), No. 93-2068.

1. Respondents assert that the "court of appeals in a prior appeal had refused to transfer the same claims." There is no record support for this contention. The court of appeals denied Ms. Mackey's Petition for Rehearing

without giving any indication whether it was rejecting Ms. Mackey's request for transfer on the merits or was following the normal practice of leaving the transfer issue to the district court. The "heightened pleading standard" and "direct evidence" issues are squarely raised in the courts below and properly before this Court. If the district court improperly applied the D.C. Circuit's "heightened pleading standard" in its analysis of Ms. Mackey's Fifth Amendment *Bivens* claims, then it is obvious that the District Court's dismissal of the claims with prejudice must be reversed.

Although this Court had unquestioned jurisdiction to consider a Petition for *Certiorari* following the first appeal, there is no rule of law requiring that the petition be filed at that time. Indeed, under the circumstances present here, where the issue of transfer was left open to be decided by the District Court on remand, a grant of *certiorari* would be inconsistent with the decisions of this Court. A litigant may wait until the case is over, then appeal from the final judgment and raise on that appeal the validity of any previous orders than have not become moot in the interim. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 353, 365 n. 1 (1973); *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("law of the case cannot bind this Court in reviewing decisions below. A petition for writ of certiorari can expose the entire case to review.") (citation omitted); *Mercer v. Theriot*, 377 U.S. 152, 153-154 (1964) (considering issues raised in first appeal on second petition for certiorari after denying certiorari following the first appeal); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"). *See Brotherhood of Locomotive Fireman v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967), denying *certiorari* "because the Court of Appeals remanded the case, [and thus] it is not yet ripe for review by this Court." *See also Estelle v. Gamble*, 429 U.S. 97,

115 (1976) (Stevens, J. dissenting), referring to the Court's "normal practice of denying interlocutory review."

2. The Opposition is in error because it omits the crucial fact that the court of appeals summarily affirmed the dismissal of Ms. Mackey's *Bivens* claims only on the grounds of lack of personal jurisdiction. The district court obviously could not dismiss the *Bivens* claims with prejudice if the district court lacked personal jurisdiction; yet the dismissal with prejudice prevents petitioner from litigating the important Constitutional issues in any other jurisdiction. Since the court of appeals never reached the merits of Ms. Mackey's *Bivens* claims during the first appeal, its decision operated as a dismissal without prejudice of the *Bivens* claims.

3. The Opposition argues that the trial judge simply did not mean what he said when he used the language "heightened pleading standard." The government is reduced to arguing what it claims "the court *effectively held*," Opp. at 7 (emphasis added), rather than what the district court actually said. *See* Pet. App. at 11a-12a.

The district court captioned its dismissal of Ms. Mackey's claim as: "B. *Failure to Meet Heightened Pleading Standard.*" Pet. App. at 11a. The district court analyzed Ms. Mackey's claims in terms of her claimed failure to meet this standard and, in fact, the district court used the expression "heightened pleading standard" three times within two pages of its decision. It is thus clear that Ms. Mackey's *Bivens* "specific factual allegations" were adjudged to be legally insufficient under Rule 12 only because they were measured against the "heightened pleading standard." Petitioner's claims were dismissed with prejudice because the District Court believed that plaintiff failed to satisfy the "heightened pleading standard" of the District of Columbia Circuit.

The holding that Ms. Mackey failed to allege the deprivation of any clearly established constitutional or statutory rights is grounded, of course, in the "heightened

pleading standard" analysis.* Pet. App. at 11a-12a. Only when measured against the "heightened pleading standard," do Ms. Mackey's claims, which are grounded in the admitted violation of criminal statutes, falsification of government documents, obstruction of a government investigation, and perjury admitted under oath by government defendant for the purpose of depriving plaintiff of her constitutional rights, become "*nothing more than ordinary federal personnel actions.*"

4. The District Court's analysis of the *Bivens* claims as "*nothing more than ordinary federal personnel actions*" obviously affected its analysis of the availability of money damages. The *Bivens* claims, based on admitted violation of criminal statutes, the falsification of documents, obstruction of a government investigation, and perjury under oath are distinct from Title VII claims.

5. The Opposition concedes violations of the civil service laws and does not dispute the admitted violation of criminal statutes, falsification of documents, obstruction of a government investigation, and perjury. There is, however, no remedy for such violations under Title VII. As Mr. Justice Scalia observed: "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that." *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S. Ct. 2742, 2754 (1993).

6. The only reasonable interpretation of the district court's 1993 refusal to transfer the *Bivens* claims is that the court relied on its 1991 analysis dismissing the same claims on the merits. In the 1991 analysis, the district court plainly relied on the "heightened pleading standard," using that term three times in its opinion. The court stated: "Because this Court has already dismissed these same claims with prejudice, the Court declines to transfer the claims to Maryland." Pet. App. at 4a. If the "height-

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*** Counsel for respondents conceded that Ms. Mackey's Complaint stated a *Bivens* claim for violation of Petitioner's Fifth Amendment due process rights. *See* Petition at 8-9.**

ened pleading standard" is erroneous, then Ms. Mackey is entitled to have her pleadings [and her request for transfer pursuant to 28 U.S.C. § 1404 or § 1406] measured against the correct legal standard used to determine whether such pleadings are meritorious.

The Opposition claims the existence of independent grounds for denying the petition because the district court held Ms. Mackey's *Bivens* claims were precluded under *Bush v. Lucas*, 462 U.S. 367 (1983). Although *Bush* precludes monetary damages for federal employment claims, the teachings of *Bush* do not bar Ms. Mackey's claims arising out of the admitted violation of criminal statutes, falsification of documents, obstruction of a government investigation, and perjury, which are clearly separate and distinct from "*ordinary federal personnel actions.*" *Id.* at 385 n.28 (wiretapping, warrantless searches, or uncompensated takings are not "personnel actions"). Since the admitted violation of criminal statutes, falsification of documents, obstruction of a government investigation, and perjury, are clearly not "*ordinary federal personnel actions,*" it follows that the District Court's analysis of *Bush* does not constitute independent grounds for denying Ms. Mackey's claims.

CONCLUSION

The Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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